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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID CARNEY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

GLENN B. MANISHIN
Counsel of Record
NEIL S. ENDE
ELISE P. WHEELESS
BLUMENFELD & COHEN
1615 M STREET, N.W., SUITE 700
WASHINGTON, D.C. 20036
(202) 955-6300

Counsel for Petitioner

59 pp

QUESTIONS PRESENTED

This case, arising under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was decided by the district court on summary judgment. The questions presented are:

1. Whether, and if so under what circumstances, a district court has discretion to deny any discovery and enter summary judgment for the government under FOIA.

2. Whether the district court below correctly held that Carney's affidavit was insufficient to justify discovery under Fed. R. Civ. P. 56(f) because the facts averred were based on inadmissible hearsay from confidential sources obtained during Carney's scholarly research into the politics of the Supreme Court judicial confirmation process.

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PETITION FOR A WRIT OF CERTIORARI

David Carney ("Carney") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 19 F.3d 807 and appears at App. 1a.-16a.[1] The district court's opinion is unreported. It appears at App. 17a-31a. The unreported judgment of the district court appears at App. 32a.

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[1] The Appendix that accompanies this petition will be cited as "App."

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. The petition for writ of certiorari is due on or before June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Fed. R. Civ. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just.

The Freedom of Information Act, 5 U.S.C § 552(b), in pertinent part exempts from release the following government records:

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

STATEMENT OF THE CASE

David Carney, a doctoral candidate and lecturer in political science at the University of Rochester, is researching the role of the Department of Justice in the nomination and confirmation of Supreme Court justices for a Ph.D dissertation and planned book. Carney's extensive research over the past four years has included, *inter alia*, nearly 100 inter-

views with journalists and interest group members who track the confirmation process as well as government officials, including Department of Justice employees, Senators and congressional staff members directly involved in confirmation politics.

Carney's academic research revealed the existence of numerous documents addressing the role of the Department of Justice in the confirmation process, ranging from Abe Fortas in the 1960s to the first two Supreme Court nominees of the 1990s. Based on this information, Carney in 1991 submitted several broad document requests to the Department of Justice under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Carney's FOIA requests sought press releases and position papers, letters and memoranda, publications, opinions, reports and evaluative materials arising out of the political activities of the Justice Department in the confirmation process.

The Department's various administrative components compiled more than 111 boxes of responsive documents.[2] However, the Department provided Carney with fewer than 25% of these records, withholding the vast bulk of the documents under claim of FOIA's "deliberative process" and privacy exemptions, 5 U.S.C. §§ 552(b)(5), 552(b)(6). In addition, the government claimed that many of the documents Carney requested did not exist or had not been located in its search of Department records.

In correspondence with the Department, Carney challenged the government's claimed FOIA exemptions as well as its claim that some requested documents no longer existed. Carney relied, among other things, on the fact that a number of the requested but withheld documents had already

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[2] Individual FOIA requests were processed by the Civil Rights Division and the Department's Office of Legal Counsel and Office of Information and Privacy.

been publicly disseminated and discussed in several books.[3] Carney also asserted that the existence of other non-exempt documents had been confirmed by individuals he had interviewed in confidence during his doctoral research.

Carney filed administrative appeals with the Justice Department, to which the Department failed to respond within the 20-day period specified by FOIA. *See* 5 U.S.C. § 552(a)(6). On May 15, 1992, Carney initiated a *pro se* complaint in the United States District Court for the Western District of New York. Count I of the complaint alleged that the government had violated FOIA by refusing to release existing and non-exempt documents within the scope of Carney's requests. Counts II through IV alleged that the Department had improperly denied Carney's request for a "fee waiver" under 5 U.S.C. § 552(a)(4)(A)(iii), had improperly collected processing fees from Carney, and had acted arbitrarily and capriciously in violation of 5 U.S.C. § 552(a)(4)(F). Carney simultaneously served interrogatories and requests for production of documents on the government.

Following a stay of discovery, the Department of Justice moved for entry of summary judgment, asserting in supporting affidavits that it had conducted reasonable, thorough and good faith searches and that any records not disclosed were either exempt from release or could not be lo-

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[3] For example, Carney cited *Matters of Principle*, by Mark Gitenstein, Chief Counsel to the Senate Judiciary Committee in 1987, which discussed the "Bluebook" prepared by the Department of Justice and "released to the press, Hill staff and outside groups" in an effort to facilitate Judge Robert Bork's confirmation. Similarly, in *Battle for Justice*, Ethan Bronner analyzed the Department of Justice sponsored paper entitled "A Response to the Critics of Judge Robert H. Bork." Finally, Carney cited *Energy in the Executive: The Case for the Strong Presidency*, by Terry Eastland, former Director of the Office of Public Administration of the Department of Justice, in which the author revealed that, during his confirmation process, Circuit Judge Douglas Ginsburg issued a statement "through" Eastland's office.

cated. Carney did not formally oppose the summary judgment motion, but rather responded by filing a motion under Rule 56(f) of the Federal Rules of Civil Procedure seeking a continuance to allow discovery in order to rebut the government's motion.

Carney's Rule 56(f) affidavit stated that:

> I intend to use discovery to obtain summary judgment evidence that much of what the Office of Legal Counsel . . . and other components of DOJ do during confirmation battles are part of large political campaigns carried on by supporters of the nominee, including DOJ personnel, interest groups, private citizens, Senators and their staff, and others, to create public support for nominees, and to win Senator's votes; and that many records are generated or received for this purpose. To establish lack of exempt status, I need to demonstrate the context in which these records are generated or received. . . . On information and belief, much of the records which Defendant is now trying to pass off as deliberative process records and attorney client privileged records are in fact records pertaining to the very political campaign described [above]. I intend to seek discovery regarding Defendant's very vague and broad claims of exemption for huge sets of records. Personal knowledge of these facts lies in Defendant's personnel.

The affidavit identified numerous classes of documents—from op-ed articles and editorials to speeches, "[q]uestions and talking points to be used during confirmation hearings by various members of the Senate Judiciary Committee," and materials disseminated to interest groups and the press—that Carney had learned about in his research, but which the Department did not identify or release in response to his FOIA requests. Carney specifically listed (by author, addressee and date) eight Justice Department memoranda, relating to the unsuccessful nominations of Justice Fortas by President

Johnson and Judge Haynsworth by President Nixon, that had been "reference[d] in published scholarly treatises" but which the government had failed to disclose or claim exemption under FOIA.[4] Carney also moved the district court to strike the government affidavits, on the ground they were not based on first-hand knowledge, and to compel discovery pursuant to his outstanding interrogatories and document requests.

The district court denied Carney's motions to strike and to compel discovery, granted the government's motion for summary judgment, and held that Carney was not entitled to a fee waiver under FOIA. App. 17a. The district court ruled that discovery was unnecessary because Carney's Rule 56(f) affidavit was not "grounded on anything other than speculation" and failed to supply "any evidence to contradict defendant's proof, or to establish defendant's bad faith." App. 28a. The court concluded that Carney did not qualify for a fee waiver because as an academic, his research would not "contribute significantly to public understanding of the operations of the government" under 5 U.S.C. § 552(a)(4)(A)(iii). App. 30a.

The United States Court of Appeals for the Second Circuit affirmed in part and reversed and remanded in part. App. 1a. The court of appeals held that under *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980), discovery "generally is unnecessary" in FOIA cases and that the district court had discretion to "forego discovery and award summary judgment on the basis of affidavits." App. 8a. The court concluded that because Carney had not shown "bad faith on the part of the agency" or pro-

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[4] Carney noted that he "contest[ed] much of the claims of exemption" of the government, for instance indicating that many "deliberative process" records appeared to have been disseminated publicly rather than maintained confidentially, but that discovery would be necessary to determine "the reasons records were created, to whom they were sent, their subject matter, and how they have been treated."

duced "tangible evidence" that claimed exemptions did not apply, entry of summary judgment was proper. App. 8a.

As to resolution of Carney's Rule 56(f) motion for discovery, the court of appeals held that while it "sympathize[d]" with Carney's inability to produce first-hand evidence from his confidential research sources, his supporting affidavit suffered from a "complete lack of tangible proof" and was "grounded in mere speculation." App. 10a. Without applying or distinguishing its earlier decision on Rule 56(f) standards in *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919 (2d Cir. 1985), the court of appeals affirmed the district court's denial of Carney's Rule 56(f) motion. The court of appeals also affirmed the district court's denial of Carney's motion to strike. The court reversed and remanded the denial of Carney's FOIA fee waiver, concluding that "the district court applied an unduly restrictive construction to the public interest fee waiver provisions." App. 12a.

In this Petition, Carney seeks review only of the lower courts' grant of summary judgment for the Department of Justice on the merits of his FOIA requests and the denial of his Rule 56(f) motion for a continuance in order to undertake discovery in opposition to the government's summary judgment motion.

REASONS FOR GRANTING THE PETITION

I. The Decision of The Court of Appeals Incorrectly Resolves an Important and Recurring Question of Summary Judgment Under the Freedom of Information Act Not Previously Addressed by This Court

The overriding issue in this case is whether a university scholar's serious inquiry into the modern Supreme Court confirmation process—centering on political uses of the Justice Department in support of the Executive Branch's judicial nomination strategies—may be stymied by the government merely because his evidence is based on research and interviews rather than first-hand knowledge of the relevant government documents. The court of appeal's judgment that a district court has discretion to deny all discovery and dismiss cases arising under the Freedom of Information Act on summary judgment makes it virtually impossible for even responsible FOIA plaintiffs to prevail, absent governmental "bad faith," and improperly truncates application of Fed. R. Civ. P. 56(f) in FOIA litigation.

A. This case merits the Court's attention because it squarely presents the question, not previously addressed by the Court, of the scope of a district court's discretion to grant summary judgment for the government under FOIA, without discovery, based solely on agency affidavits describing the search conducted and supplying a so-called *Vaughn* index of documents withheld under the Act's exemptions.[5] In the ab-

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[5] *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The Act provides for several exemptions from release, including Exemption 5 (deliberative process and attorney-client) and Exemption 6 (privacy) at issue in this litigation. *See* App. 24a-25a; 5 U.S.C. §§ 552(b)(5), 552(b)(6). Exemption 5 has been described as "the most difficult FOIA exemption to understand and apply." A CITIZENS GUIDE TO USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H. REP. NO. 101-193, 101ST CONG., 1ST SESS. 13 (1989).

sence of direction from this Court, the courts of appeals have concluded—as did the Second Circuit here—that where the government proffers affidavits describing a reasonable search and specifically explaining the FOIA exemptions applicable to documents withheld from release, summary judgment should be granted in the absence of a showing of "bad faith" on the part of the defendant agency. App. 8a-9a. As the District of Columbia Circuit held in 1978:

> [t]he agency's affidavits, naturally, must be 'relatively detailed' and nonconclusory, and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forego discovery and award summary judgment on the basis of affidavits.

Goland v. Central Intelligence Agency, 607 F.2d 339 (D.C. Cir. 1978)(footnotes omitted), *cert. denied*, 445 U.S. 927 (1980).

The *Goland* test, developed in an FOIA case involving national security materials,[6] has been extended and applied generally by the courts of appeals to all FOIA cases. *See, e.g., Gillin v. IRS*, 980 F.2d 819, 823 (1st Cir. 1992); *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Simmons v. United States Department of Justice*, 796 F.2d 709, 711-12 (4th Cir. 1986); *Lesar v. United States Department of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980); *Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). Where a plaintiff cannot rebut the government's affidavits with concrete evidence showing that the scope of the agency search was unreasonable, or that the agency misapplied the Act's exemptions, or that the government otherwise acted in bad faith, federal courts routinely hold that discovery is unavail-

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[6] 607 F.2d at 351-52.

able and enter summary judgment for the defendant agency.[7] As a result, "[d]iscovery is greatly restricted in FOIA actions"[8] and "nearly all FOIA cases are adjudicated in the context of motions for summary judgment."[9]

Under this approach, applied by the court of appeals below, discovery is considered "generally unnecessary" if the agency's affidavits "are adequate on their face." App. 8a, *citing Goland v. CIA*, 607 F.2d at 352. Agency affidavits are accorded a "presumption" of good faith, *id.*, *citing Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and bad faith cannot be inferred from delay in release of documents, from release of records initially withheld as exempt, or even from the existence of documents not revealed by the agency's search.[10]

The legitimacy of this rule is questionable in light of the objectives of FOIA. The Act was intended to ensure an informed citizenry and to serve as a vital check against governmental abuse. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA's "basic policy" is that "dis-

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[7] "Summary judgment without discovery is appropriate where the plaintiff has made no showing of agency bad faith sufficient to impugn the agency affidavit." *Van Strum v. U.S. Environmental Protection Agency*, 680 F. Supp. 349, 352 (D. Or. 1987).

[8] U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, p. 359 & nn. 205-06 (Sept. 1993)("DOJ GUIDE").

[9] A. Aman & W. Mayton, ADMINISTRATIVE LAW § 17.3.4 at 634 (1993).

[10] *Military Audit Project v. Casey*, 656 F.2d 724, 754 (D.C. Cir. 1981)(disclosure of previously withheld documents); *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986)(failure to produce all relevant materials). As construed by the courts of appeals, the "crucial" FOIA issue "is not whether relevant documents might exist, but whether the agency's search was 'reasonably calculated' to discover the requested documents." *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993)(citation omitted).

closure, not secrecy, is the dominant objective," *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976), and this Court has "endeavored to apply a workable balance between the interest of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989). In this light, the plain imbalance of information in FOIA cases shows that a general rule restricting discovery merely to the agency's search and its "good faith" is unnecessary and inconsistent with the Act's basic policies. *See Goland v. CIA*, 607 F.2d at 357-58 (Bazelon, J., dissenting).

FOIA cases present unusual discovery considerations because they are premised, almost by definition, on asymmetric information quite different from most civil litigation. *Id.* Plaintiffs rarely have any first-hand knowledge of the scope of the agency's search or the existence of non-exempt records, and this lack of knowledge "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Under the prevailing *Goland* rule, therefore, FOIA plaintiffs are ordinarily denied discovery except in highly unusual instances, such as where public sources conflict with the agency affidavits, *Washington Post Co. v. United States Department of State*, 840 F.2d 26, 28 (D.C. Cir. 1988), *vacated on other grounds*, 898 F.2d 793 (1990), where the affidavits are internally contradictory, *Porter v. United States Department of Justice*, 717 F.2d 787, 791-93 (3d Cir. 1983), or where undisclosed government documents are surreptitiously obtained by the plaintiff. *Van Strum v. U.S. Environmental Protection Agency*, 680 F. Supp. 349, 351 (D. Or. 1987).

In contrast to normal civil litigation, where summary judgment is rarely granted in situations in which the relevant evidence is controlled by the moving party, *e.g.*, *Patty Precision v. Brown & Sharpe Manufacturing Co.*, 742 F.2d 1260

(10th Cir. 1984), the courts of appeals have reversed the presumption in FOIA cases, creating a rule that essentially guarantees the grant of summary judgment for the government. This approach may be justifiable as a matter of policy, in that it protects government agencies from the burden of discovery in some meritless FOIA cases, but when elevated to a general rule applicable to *all* cases it cannot easily be harmonized with this Court's FOIA jurisprudence, which emphasizes that the Act "was not intended to supplement or displace rules of discovery." *John Doe Agency*, 493 U.S. at 153 (citations omitted).

Furthermore, even if the policy of deterring vexatious litigation were a sufficient basis for FOIA-specific discovery rules, there is no apparent statutory *or* policy justification—at least outside the national security context—for limiting discovery and the plaintiff's relevant evidentiary showing on summary judgment to the "good faith" of the agency.[11] Where, as here, a FOIA plaintiff has evidence that responsive documents exist which the agency failed to uncover in its search or misclassified in its *Vaughn* index, such evidence should create a material question of fact precluding summary judgment, without the additional necessity to prove governmental bad faith.

B. This case also merits *certiorari* review because, as applied by the court of appeals below, the *Goland* rule effectively repeals application of Fed. R. Civ. P. 56(f) in FOIA cases. Rule 56(f) allows a party to avoid summary judgment, without affidavit evidence establishing a material question of fact, where the party presents a reasonable explanation why

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[11] *See, e.g., Church of Scientology of San Francisco v. IRS*, 991 F.2d 560, 563 (9th Cir. 1993)(noting that *Goland* involved "special considerations" of national security); *Goland v. CIA*, 607 F.2d at 358 (Bazelon, J., dissenting)(concluding that majority opinion eroded discovery in FOIA cases "in its zeal to protect the CIA from the burden of processing meritless requests for vital security information.")

summary judgment cannot be opposed in the absence of discovery.[12] While Rule 56(f) expressly sanctions discovery where the nonmoving party cannot "present by affidavit facts essential to justify the party's opposition," the court of appeals below held, in contrast, that an FOIA plaintiff cannot rely on Rule 56(f) in the absence of "tangible proof" of governmental misconduct. App. 10a.

The relationship of Rule 56(f) to FOIA has generally befuddled the courts of appeal. While some early cases allowed relief under Rule 56(f) without elaboration, *see*, e.g., *Shaffer v. Kissinger*, 505 F.2d 389, 390-91 (D.C. Cir. 1974), more recently courts have decided FOIA discovery issues without addressing Rule 56(f), *Safecard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), or have simply refused to answer the question whether it is an abuse of discretion "to deny *any* discovery" in an FOIA summary judgment case, confining their decisions to the facts presented. *E.g.*, *Church of Scientology of San Francisco v. IRS*, 991 F.2d 560, 562 (9th Cir. 1993)(emphasis in original). This case invites the Court to resolve the issue—unsettled for 15 years since *Goland* and reserved last year by the Ninth Circuit in *Church of Scientology*—whether Rule 56(f) restricts the scope of the district court's discretion to deny discovery prior to granting summary judgment for the government under FOIA.

The answer to that question must undoubtedly be in the affirmative. Even if the court of appeals below were correct in limiting the relevant FOIA issues on summary judgment to the scope of the government's search and its good faith, the court plainly erred by extending *Goland* to resolve Carney's Rule 56(f) motion as well. The normal, non-FOIA

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[12] Rule 56(f) permits the district court to continue a summary judgment motion "to permit affidavits to be obtained or depositions to be taken or discovery to be had" where "the party opposing the motion cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed. R. Civ. P. 56(f).

standard for Rule 56(f) motions is not controversial. Where the party opposing summary judgment explains the nature of the discovery sought, how those facts are reasonably expected to create a genuine issue of material fact, what efforts the party has made to obtain that evidence, and why those efforts were unsuccessful, courts ordinarily grant Rule 56(f) motions. *See, e.g., Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 926 (2d Cir. 1985).[13] Under these standards, FOIA plaintiffs need *not* already be in the possession of "tangible evidence" contradicting the government's affidavits in order to pursue discovery, but rather must only show that there is a plausible (and non-dilatory) basis to believe that discovery might produce admissible facts sufficient to oppose summary judgment.

By engrafting the *Goland* test onto Rule 56(f), the Second Circuit has transformed FOIA from an agent of governmental openness into a procedural "Catch 22." FOIA requesters cannot oppose a government summary judgment motion on the merits in the absence of concrete evidence—which is ordinarily unavailable—and yet where they move for a Rule 56(f) continuance allowing discovery, their request is denied, as well, based on the same absence of "tangible" evidence. Presumably, the court of appeals below reasoned that a more tolerant application of Rule 56(f) might spawn "speculative" efforts to forestall disposition of FOIA cases, and therefore chose *sub silentio* to reject application of the traditional 56(f) test to FOIA actions.

Contrary to the Second Circuit's apparent logic, application of traditional Rule 56(f) standards would work no

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[13] *Accord, Guthrie v. Sawyer*, 970 F.2d 733, 738 (10th Cir. 1992); *VISA Int'l Serv. v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986); *Paul Kadair, Inc. v. Sony Corp.*, 694 F.2d 1017, 1031 (5th Cir. 1983); *SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 900-01 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1982); *Robin Constr. Co. v. United States*, 345 F.2d 610, 614 (3d Cir. 1965).

untoward change in the relative risks and burdens of FOIA litigation. The normal Rule 56(f) test fully meets the *Goland* policy of deterring vexatious FOIA litigation by making clear that "vague assertions" regarding facts to be discovered are insufficient, alone, to warrant discovery. *Burlington Coat Factory*, 769 F.2d at 926, *citing SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1982). The "mere assertion 'that the evidence supporting a [party's] allegation is in the hands of the [opposing party] is insufficient to justify a denial of summary judgment under Rule 56(f).'" *Patty Precision v. Brown & Sharpe Manufacturing Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984), *quoting Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981).[14]

By requiring the FOIA plaintiff to specify which facts he expects to establish through discovery, how those facts would be relevant on summary judgment, and specifically why the party has been unable to obtain that evidence, these Rule 56(f) principles meet any legitimate policy supporting limitation of FOIA discovery. Rather than opening the floodgates to massive federal court FOIA discovery, Rule 56(f) would function, as it should, to provide relief only for those parties who come forward with a relatively specific and reasonable showing that discovery may establish a factual issue for trial on the merits. Thus, the court of appeals' refusal to apply Rule 56(f) illustrates the substantial need for this Court's guidance on summary judgment issues in FOIA cases.

While the Court has frequently addressed interpretation of the Act's exemptions, it has never accepted review in

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[14] Likewise, Rule 56(f) motions need not be granted if the party seeking discovery has been dilatory, or the information sought is either irrelevant to the summary judgment motion or merely cumulative. *E.g., Exxon Corp. v. FTC*, 663 F.2d 120, 128 & n.25 (D.C. Cir. 1980); *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d at 1264-65.

a case involving summary judgment standards for FOIA cases. Accordingly, even if the Court agrees with the approach of *Goland* and its progeny toward FOIA summary judgment generally, it should grant review in this case in order to assess application of Rule 56(f) in FOIA litigation. Contrary to the court of appeals below, which rejected traditional Rule 56(f) standards in favor of a FOIA-specific rule, district courts should *not* enjoy discretion to deny discovery where the FOIA plaintiff meets the otherwise-applicable requirements governing Rule 56(f) motions.

II. The Court of Appeals' Judgment Is So Patently Erroneous That This Court Should Accept Review in an Exercise of Its Supervisory Powers

The court of appeals' judgment rests on the proposition that petitioner Carney raised purely "speculative" considerations in his Rule 56(f) motion. Yet Carney's affidavit presented precisely those circumstances—for which Rule 56(f) was designed—in which a party's admissible evidence is inadequate to oppose summary judgment, but where the party has gained information demonstrating that discovery can reasonably be expected to create a material question of fact.

Carney represents a very unusual FOIA plaintiff. In the course of his extensive scholarly research into modern confirmation politics, Carney has interviewed key members of the Senate, their staffs, Justice Department lawyers, public interest group advocates and media representatives involved in the controversial nomination battles over the past two decades. From this serious inquiry, Carney has learned of the existence of numerous records not accounted for in the government's *Vaughn* indices, and has been informed that a variety of documents—including Q&As, speeches, op-ed articles, etc.—are routinely prepared by the Justice Department and distributed to legislative and other "allies" of the Admin-

istration's nominee.[15] Thus, Carney has fair grounds to believe that documents have been withheld by the Justice Department or that many documents classified by the government as subject to the "deliberative process" and attorney-client exemptions have already been publicly disseminated and are therefore subject to release under FOIA.

The court of appeals' conclusion that this evidence is somehow too "speculative" to support Rule 56(f) relief is a gross miscarriage of justice. Carney is not just guessing or posturing, but rather presents a reasonable explanation for why he cannot, without discovery, present admissible affidavit evidence in opposition to summary judgment.[16] Given the political sensitivity of the issues, the sources of his information are, not surprisingly, unwilling to provide on-the-record confirmation. That this evidence is admittedly based on hearsay, and thus inadmissible at trial, is no bar to its consideration under Rule 56(f), as the court of appeals recognized. App. 10a. Thus, since Carney has spoken directly with persons who have used, and on occasion seen himself, the very documents he asserts have been withheld or misclassified by the Justice Department, he has satisfied all of the traditional tests for Rule 56(f) relief.[17]

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[15] The record reveals, for instance, that several significant documents publicly released by the Justice Department and subsequently discussed in published accounts of the Robert Bork and Douglas Ginsburg confirmation battles, *see* note 3 *supra*, were not accounted for by the Department's FOIA search in this case.

[16] Carney's Rule 56(f) affidavit explained that "[w]hile academic standards allow one to present statements made in confidential interviews as evidence in support of a proposition, legal standards for summary judgment proceedings do not; it is unattributed hearsay, and it is not based on personal knowledge."

[17] Although Carney's affidavit tracked and discussed each of the Rule 56(f) elements of *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 926 (2d Cir. 1985), the court of appeals failed to discuss or distinguish its controlling precedent, App. 10a, and the district

(Footnote continued on next page)

The irony of the court of appeals' holding is clear. Had Carney acted less than honorably, and stolen or surreptitiously obtained "leaked" copies of the documents the government claims no longer exist or are exempt from disclosure, the law is clear that he would then have presented sufficient grounds to move forward with discovery. *Van Strum v. U.S. Environmental Protection Agency*, 680 F. Supp. 349, 351 (D. Or. 1987)(documents received from "anonymous sources"). Yet after taking the responsible alternative of explaining to the district court that he lacks first-hand knowledge and specifying the steps he wished to pursue in discovery, Carney is greeted with the response that without "identify[ing], by name, title or otherwise, any of the individuals he interviewed," he has not met the prerequisites for Rule 56(f) relief. App. 10a. This is not and cannot be correct, for this rule, if applicable, would preclude any responsible FOIA requester in a politically sensitive area from pursuing the release of documents identified by confidential sources.

By extending the "tangible proof" requirement to Rule 56(f) motions, the court of appeals in reality has held that where a FOIA requester's "inside" governmental sources are unwilling to provide affidavit corroboration, discovery should be denied based on the traditional *Goland* rule that government FOIA affidavits prevail unless contradicted by concrete evidence.[18] In other words, if a plaintiff has no first-hand proof conflicting with the government's FOIA af-

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court held incorrectly that Rule 56(f) barred discovery absent "evidence to . . . establish the defendant's bad faith." App. 28a.

[18] The court of appeals stated that Carney did not "point to any of the published sources on which he supposedly relies," App. 10a, but the record before the court of appeals included correspondence and other materials identifying with precision the public sources in which some confirmation-related Justice Department documents, withheld from Carney, were described in detail. *See* note 3 *supra*.

fidavits, the government wins, but even if the plaintiff has second-hand evidence contradicting the government's FOIA affidavits, discovery is still denied and the government prevails anyway.

The applicable abuse of discretion standard of appellate review does nothing to support the court of appeals' holding. A district court's exercise of discretion cannot be affirmed where the court applied an incorrect legal standard.[19] Here, the district court rejected Carney's affidavit, at the urging of the Justice Department, on the ground that Rule 56(f) requires "evidence to contradict the defendant's proof, or to establish defendant's bad faith," a plainly erroneous view of the law. App. 28a.[20] Furthermore, there are numerous alternatives open to the trial judge in an FOIA case short of dismissal, including *in camera* review of withheld documents, appointment of a special master and "sampling" of documents in cases, like this, involving large requests.[21] Particularly where the FOIA plaintiff is engaged in a non-

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[19] *E.g., In re Mandley Shores Coop. Housing Assoc.*, 21 F.3d 380 (11th Cir. 1994); *Chemical Bank v. Haseotes*, 13 F.3d 569, 573 (2d Cir. 1994)(per curiam); *Stormy Clime Ltd. v. ProGroup, Inc.*, 809 F.2d 971, 973-74 (2d Cir. 1987).

[20] In its arguments below, the government incorrectly equated hearsay and "speculation" as basis for denying Rule 56(f) relief. The government maintained that Carney's affidavit was insufficient to contradict the government's FOIA affidavits because "[t]he district court faced a choice between specific testimony describing extensive searches for responsive records and Carney's speculation, based on alleged statements of anonymous, out-of-court interviewees." Brief for the Appellee, at 33 (filed Aug. 19, 1993). "Only statements by the interviewees themselves could be considered to counter the Department's declarations . . . . Carney's second-hand summary of their remarks is insufficient." *Id.* at 30 & n.11.

[21] *Laborers' International Union of North America v. United States Department of Justice*, 772 F.2d 919 (D.C. Cir. 1984)(*in camera* review); *Maynard v. CIA*, 986 F.2d 547, 558 (1st Cir. 1992)(*in camera* review); *Ash Grove Cement Co. v FTC*, 511 F.2d 815, 817 (D.C. Cir. 1975)(sampling); *Meerpol v. Meese*, 790 F.2d 942, 961 (D.C. Cir. 1986)(special master).

commercial pursuit and, as in this litigation, proceeds on a *pro se* basis, the district court should have at least some obligation to explore less severe alternatives to a summary judgment dismissal.

Unlike many FOIA litigants, Carney's documentary requests are based on an extraordinary level of investigation into the government activity involved, and are part of a serious scholarly inquiry in an important area of political discourse. The court of appeals' judgment so distorts the appropriate Rule 56(f) burden on plaintiffs in FOIA cases that this Court should grant *certiorari* in order to reach, and reverse, the court of appeals' clear error. In the absence of review by this Court, the academic study of modern confirmation politics, as well as the law governing summary judgment in FOIA litigation, will be the clear losers.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GLENN B. MANISHIN
Counsel of Record
NEIL S. ENDE
ELISE P. WHEELESS
BLUMENFELD & COHEN
1615 M STREET, N.W., SUITE 700
WASHINGTON, D.C. 20036
(202) 955-6300

Counsel for Petitioner

Dated: June 21, 1994.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 724 -- August Term, 1993

(Argued: November 17, 1993) (Decided: March 23, 1994)

Docket No. 93-6133

DAVID CARNEY,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant - Appellee.

Before: FEINBERG, TIMBERS, AND MINER, *Circuit Judges.*

Appeal from summary judgment entered in the United States District Court for the Western District of New York (Telesca, J.), dismissing plaintiff-appellant's complaint for disclosure of records under the Freedom of Information Act, the district court having found that plaintiff-appellant was not entitled to discovery under Fed. R. Civ. P. 56(f), that there were no genuine issues of fact relating to adequacy of defendant-appellee's disclosure of records, that declarations submitted by defendant-appellee were in proper form required by Fed. R. Civ. P. 56(e) and that plaintiff-appellant had not demonstrated his entitlement to waivers of fees for searching and duplicating records.

Affirmed in part, reversed in part.

DAVID CARNEY, Washington, D.C., *pro se.*

ROBERT S. WHITMAN, Civil Division, United States Department of Justice, Washington, D.C. (Frank W. Hunger,

Assistant Attorney General, Washington, D.C., Patrick H. NeMoyer, United States Attorney General for the Western District of New York, Leonard Schaitman, Civil Division, United States Department of Justice, Washington, D.C. (*of counsel*), *for defendant-appellee.*

MINER, *Circuit Judge:*

Plaintiff-appellant David Carney appeals from a judgment entered on April 27, 1993 in the United States District Court for the Western District of New York (Telesca, J.), granting summary judgment in favor of defendant-appellee the United States Department of Justice ("DOJ") and dismissing Carney's complaint in an action brought to compel disclosure of records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988). The district court found that Carney was not entitled to discovery under Rule 56(f) of the Federal Rules of Civil Procedure; that there were no genuine issues of fact relating to the adequacy of the DOJ's disclosure of records; that declarations submitted by the DOJ were in the form required by Rule 56(e); and that the DOJ properly denied Carney's demand for the fee waiver available under the FOIA for persons who use disclosed information in the public interest and for the fee reduction available to representatives of the news media. *Id.* § 552(a)(4)(A). In accordance with the following, we reverse on the fee waiver issue and affirm in all other respects.

BACKGROUND

Carney is a member of the Alaska Bar and a doctoral student in political science at the University of Rochester. He currently is working on a dissertation regarding the role of the DOJ in the federal judicial selection and confirmation process. Beginning in October of 1990, Carney submitted numerous, extensive requests to several subdivisions of the DOJ pursuant to the FOIA.

Carney sent five requests to the Office of Legal Counsel ("OLC"). Through these requests Carney sought,

inter alia, personnel information about OLC staff members; records pertaining to numerous Supreme Court nominations and potential nominations; communications between DOJ staff members and the President; records pertaining to the impeachment of certain Supreme Court Justices; records pertaining to Anita Hill; policy statements and other records relating to the judicial selection process; and records relating to OLC practices in complying with FOIA requests, including his own.

The OLC's search produced 111 boxes of documents responsive to Carney's first request, with each box containing about 5000 pages. Twenty-five of these boxes, along with forty-seven individual documents, were made available to Carney. Some of the pages in these boxes and in the individual documents were excised pursuant to the deliberative process and attorney-client exemptions, 5 U.S.C. § 552(b)(5) ("Exemption 5"), and the privacy exemption, *id.* § 552(b)(6) ("Exemption 6"). The remaining eighty-six boxes were not made available to Carney. Nineteen of the eighty-six boxes contained documents originating in other agencies and DOJ subdivisions. The OLC offered to refer these documents to the originating agency or subdivision for processing, but Carney did not respond to the offer. The OLC withheld the remaining sixty-seven boxes pursuant to Exemptions 5 and 6. In response to Carney's other requests, the OLC made about twenty documents available to Carney, some with excisions pursuant to Exemption 6, and withheld about sixty responsive documents pursuant to Exemption 5 and the Privacy Act exemption compiled in anticipation of civil litigation, 5 U.S.C. § 552a(d)(5).

The Office of Information and Privacy ("OIP") of the DOJ processed requests by Carney directed to the Office of the Attorney General, the Office of Public Affairs and the Office of Legislative Affairs. The requests of these offices sought information similar to that sought from the OLC. The OIP provided numerous items responsive to Carney's re-

quests, including records pertaining to third parties, such as previous FOIA and Privacy Act requesters, as well as DOJ employees. Pursuant to Exemption 6, the OIP excised portions of the documents it provided. The Civil Rights Division responded to Carney's demands with over 450 pages of documents. In twenty-one of these documents personal information was excised pursuant to Exemption 6.

Along with his voluminous FOIA requests, Carney asked each of the DOJ subdivisions to which he had addressed his demands to exempt him from payment of the standard FOIA search fees. Carney contended that he was entitled to the exemptions under the FOIA provision allowing fee waivers or fee reductions "if disclosure of information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552 (a)(4)(A)(iii). He also contended, as to some of his requests, that he was entitled to the fee reduction available to members of the media. *See id.* § 552 (a) (4)(A)(ii)(II). Carney argued that he was entitled to the fee waivers because he was writing a dissertation and a book on the subject of the DOJ's role in the judicial selection process and that he intended to write scholarly articles for academic journals and already had written two newspaper articles dealing with the same subject. According to Carney, very little has been written on the role of the DOJ in the selection and confirmation process. In later communications with the DOJ, Carney indicated that he planned to use the disclosed material in college classes that he teaches and that he would make presentations and present papers based on the information.

Carney's requests for fee waivers were denied by each of the DOJ subdivisions. The OLC gave two reasons for denying Carney's request: (1) that Carney had not supplied sufficient evidence that dissemination of any dissertation, book, or article he wrote would be broad enough to jus-

tify a waiver; and (2) that, because most of the records produced by the OLC were subject to the attorney-client and deliberative process privileges encompassed in Exemption 5, release of any non-exempt documents would not "contribute significantly" to the public understanding of governmental operations and activities. The OLC estimated that the search costs associated with Carney's request would be about $500 and demanded a $250 advance payment before it would undertake the search. Carney made the required advance payment. The OLC later revised its estimate to $750, and Carney committed himself to pay the amount as well.

The OIP denied Carney's request for a fee waiver, stating that the information sought by Carney already had been released to other requesters and "disclosure of the same material to [Carney] [was] not likely to contribute significantly to an understanding of government operations or activities in the area of federal judicial nominations." The OIP estimated its search fee to be $720, which Carney committed himself to pay. Finally, the Civil Rights Division denied Carney's request for a fee waiver, stating that Carney had failed to demonstrate that disclosure of the records he requested would contribute significantly to the public understanding of governmental operations. The Civil Rights Division assessed $34.80 to Carney in duplication fees, which Carney paid. Carney timely filed administrative appeals challenging the assessment of fees by the various DOJ subdivisions.

Carney filed a complaint in the district court on May 15, 1992, commencing an action to compel compliance with the FOIA demands to which the DOJ subdivisions had not yet responded. The complaint includes allegations that the DOJ improperly withheld records notwithstanding Carney's valid requests under FOIA; improperly denied his request to be furnished documents without a fee, or at a reduced fee, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii); and wrongfully collected fees from him. Along with his complaint, Carney

served interrogatories, document requests and a demand for inspection. He also sent a letter to the DOJ stating his intention to conduct numerous depositions.

In June of 1992, the DOJ moved to stay discovery to allow it to finish processing Carney's FOIA requests. Magistrate Judge Fishner, to whom all non-dispositive motions had been assigned, stayed discovery and set a deadline of December 15, 1992 for the DOJ to process the outstanding FOIA requests. The DOJ subdivisions responded in the manner previously described.

On January 20, 1993, the DOJ moved for summary judgment as to the withheld documents. In support of the motion, it submitted three declarations describing the searches undertaken by the DOJ subdivisions in response to Carney's requests, identifying the responsive documents made available to Carney and explaining how the withheld documents fell within the applicable FOIA exceptions.

Carney did not challenge the DOJ's motion for summary judgment. Instead, he responded with several motions of his own; a motion to compel responses to his previous discovery requests; a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure for leave to conduct discovery; and a motion to strike the declarations submitted by the DOJ in support of its summary judgment motion. In support of his Rule 56(f) motion, Carney submitted an affidavit explaining that, based upon over one hundred interviews he conducted with numerous individuals, including current and former DOJ officials, White House personnel, Senators and their staffs, and others, along with other research he performed, he believed that the DOJ improperly had classified numerous documents as exempt and had failed to disclose the existence of many other documents which should have been provided to him. The latter documents purportedly relate to the role of the DOJ, particularly the OLC, in garnering support for judicial nominees. According to Carney's "information," the OLC is involved in, among other things,

written speeches for Senators, ghostwriting newspaper articles and leaking information to the press in connection with judicial nominations and confirmations.

Carney argued that discovery was necessary because he was unable to support his argument with admissible proof, such as affidavits and corroborating letters, because his sources spoke to him in confidence. Through discovery, Carney sought to identify the missing documents and to ascertain the role of the DOJ in the nomination and confirmation process with the goal of raising a factual issue as to whether the FOIA exemptions applied to documents withheld by the DOJ. Carney's motion to strike the DOJ declarations was based on his contention that the declarants did not have personal knowledge as required by Rule 56(e) of the Federal Rules of Civil Procedure. Carney also filed a motion for partial summary judgment on his fee waiver claims, in response to which the DOJ later filed a cross-motion for summary judgment.

The district court denied Carney's motion to strike the DOJ declarations, finding that they were sufficient under Rule 56(e); it denied Carney's Rule 56(f) motion, finding that his affidavit in support of that motion was pure speculation and was insufficient to justify discovery; and it held that Carney was not entitled to a fee waiver because his dissertation, future teaching, scholarly publishing and tentative book were insufficient to establish that release of information to him would be likely to contribute significantly to public understanding of the operations and activities of the government and that his occasional newspaper piece did not merit him status as a representative of the news media. Accordingly, the district court denied Carney's motion for partial summary judgment, granted the DOJ's motion and cross-motion for summary judgment and dismissed the complaint. The appeal followed.

DISCUSSION

1. Rule 56(f) Motion

In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption of the FOIA. *See* 5 U.S.C. § 552(a)(4)(B); *EPA v. Mink*, 410 U.S. 73, 79 (1973). Affidavits or declarations[1] supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden. *See Maynard v. CIA*, 986 F. 2d 547, 560 (1st Cir. 1993); *Perry v. Block*, 684 F. 2d 121, 127 (D.C. Cir. 1982) (per curiam); *Malizia v. United States Dep't of Justice*, 519 F. Supp. 338, 342 (S.D.N.Y. 1981). Affidavits submitted by an agency are "accorded a presumption of good faith," *Safecard Servs., Inc. v. SEC*, 926 F. 2d 1197, 1200 (D.C. Cir. 1991); accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face. When this is the case, the district court may "forgo discovery and award summary judgment on the basis of affidavits." *Goland v. CIA*, 607 F. 2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *accord Maynard*, 986 F. 2d at 556 n.8; *Simmons v. United States Dep't of Justice*, 796 F. 2d 709, 711-712 (4th Cir. 1986).

In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, *Goland*, 607 F. 2d at 355, or provide some tangible evidence that an exemption claimed

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[1] In accordance with 28 U.S.C. § 1746 (1988), unsworn declarations, subscribed by the declarant as true under penalty of perjury, may be substituted for affidavits.

by the agency should not apply or summary judgment is otherwise inappropriate, *see, e.g. Washington Post Co. v. United States Dep't of State*, 840 F. 2d 26, 28 (D.C. Cir. 1988) (non-moving party produced hard evidence in the form of books and press accounts suggesting privacy exemption did not apply), *vacated on other grounds*, 898 F. 2d 793 (1990); *Porter v. United States Dep't of Justice*, 717 F. 2d 787, 791-93 (3d Cir. 1983)(agency's affidavits included conflicting information); *Schaffer v. Kissinger*, 505 F. 2d 389, 390-91 (D.C. Cir. 1974)(per curiam)(inadequate reasons stated for application of national security exemption).

Here, the district court found that the declarations submitted by the DOJ were sufficient to meet the agency's burden of proof, and Carney does not challenge this finding. Suffice it to say, the declarations are reasonably detailed and reveal that each of the DOJ subdivisions undertook a diligent search for documents responsive to Carney's requests. With respect to the withheld documents, the declarants describe the documents or classes of documents withheld and explain why they fall within an applicable exemption.

Carney first argues that the affidavit he submitted pursuant to Rule 56(f) provides sufficient grounds to justify discovery and that the district court abused its discretion in denying him discovery. We disagree. The thrust of allegations in Carney's Rule 56(f) affidavit and indeed his arguments on appeal is (1) that he is in possession of information suggesting that the DOJ has failed to acknowledge the existence of "huge classes" of records responsive to his FOIA requests and (2) that many of the records the DOJ withheld pursuant to the deliberative process and attorney-client privileges actually have been disseminated to the public as a part of a propaganda campaign waged by the DOJ in its efforts to garner support for judicial nominees and accordingly were not exempt from disclosure. Essentially, Carney contends that the DOJ has concealed the existence of records and mis-

characterized other records in order to avoid disclosing them to him.

Although his information allegedly was gained through over one hundred interviews and significant academic research, Carney does not identify, by name, title or otherwise, any of the individuals he interviewed, nor does he point to any of the published sources on which he supposedly relies. Carney argues that his sources spoke to him in confidence. While we sympathize with Carney's dilemma in this regard, we are nevertheless faced with a complete lack of tangible proof of his allegations. We agree with Carney that, in support of his Rule 56(f) affidavit, he was not required to present evidence that would be admissible at trial, *see* 10A Charles A. Wright, et al. *Federal Practice and Procedure* § 2740, at 530 (2d ed. 1983), but something more than his bare allegations is needed. Without factual support, Carney's allegations are grounded in mere speculation, and the district court therefore did not abuse its discretion in denying him discovery. *See, e.g., Safecard*, 926 F. 2d at 1200 ("Agency affidavits . . . cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'")(quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F. 2d 770, 771 (D.C. Cir. 1981)); *cf. Eastway Constr. Corp. v. City of New York*, 762 F. 2d 243, 251 (2d Cir. 1985)(speculative allegations of conspiracy insufficient to justify discovery).

2. *Motion To Strike DOJ Declarations*

Carney next contends that the declarations submitted by the DOJ in support of summary judgment were improper under Rule 56(e) because the declarants did not have personal knowledge of the facts relating to the searches undertaken by their respective subdivisions. Each of the declarations was prepared by the individual who had supervised the processing of Carney's FOIA requests. The declaration prepared by Paul Colbern indicates that Colbern was in charge of processing FOIA requests for the OLC and personally su-

pervised Carney's requests and reviewed the withheld documents. The declaration of Miriam Nisbet indicates that she is the Deputy Director of the OIP's Office of Policy and Communication. It is apparent from the record that she was personally involved in processing Carney's requests. In her declaration, Nisbet describes in detail OIP's processing of Carney's requests to the Office of the Attorney General, the Office of Public Affairs and the Office of Legislative Affairs. Finally, the declaration of Nelson Hermilla indicates that he is the Chief of the FOIA/Privacy Act Branch of the Civil Rights Division and that he supervised the processing of Carney's requests to the Division.

An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search. *See Maynard*, 986 F. 2d at 560; *Safecard*, 926 F. 2d at 1201. The DOJ's submissions thus were proper.

3. Fee Waivers

The FOIA permits agencies to charge search and duplication fees to requesters.[2] 5 U.S.C. § 552(a)(4)(A). Section 552(a)(4)(A)(iii) provides that the fees shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester." Carney contends that he is entitled to this fee waiver.[3] The district court, and hence this Court, must re-

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[2] An agency also may charge document review fees to commercial requesters. 5 U.S.C. § 552(a)(4)(ii)(I).

[3] Carney also contends that he is a "representative of the news media" and thus may only be assessed duplication costs in connection with his FOIA requests. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). Although we doubt that Carney is eligible for this fee reduction, we need not address the is-

(Footnote continued on next page)

view an agency's determination on a fee waiver issue de novo, but only with reference to the records before the agency. 5 U.S.C. § 552(a)(4)(a)(vii). Because we find that the DOJ and the district court applied an unduly restrictive construction to the public interest fee waiver provision, we remand to the district court for further consideration of this matter.

To establish his right to a fee waiver under the public interest provision, the burden was on Carney to establish that the disclosure of information was in the public interest and was not primarily in his commercial interest. *See National Treasury Employees Union v. Griffin*, 811 F. 2d 644, 648 (D.C. Cir. 1987). The DOJ does not dispute that disclosure to Carney was not primarily in his commercial interest. In determining whether disclosure of records will contribute significantly to the public's understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requester to disseminate the information. *See Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam).

Here, we have little trouble concluding that the subject matter of Carney's requests—the role of the DOJ in the judicial selection process—is relevant to the public's understanding of government. In support of its position that disclosure to Carney would not be in the public interest, the DOJ first reasons that Carney's use of any disclosed records in his dissertation, scholarly articles, college classes, panels and conventions and in his tentative book simply would not reach a large enough audience to contribute "significantly" to the public's understanding in this area. In this regard, the DOJ relies on its regulation interpreting the public interest fee waiver provision, which requires that disclosure improve

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sue in light of our conclusion that Carney is entitled to the public interest fee waiver.

the understanding of "the public at large" and not just "the individual understanding of the requester or narrow segment of interested persons." 28 C.F.R. § 16.10(d)(2)(iii) (1993).

As applied in this case, we believe the DOJ's interpretation of the fee waiver provision is unreasonable. As we understand the DOJ's position, no fee waiver would be granted to one unable to shoulder the formidable burden of demonstrating that any records released actually will be disseminated to a large cross-section of the public. This position is not realistic. Information need not actually reach a broad cross-section of the public in order to benefit the public at large.[4] For instance, the DOJ suggests that, because Carney's dissertation and proposed articles and book on the role of the DOJ in the judicial selection process are scholarly in nature, they will not reach a general audience and hence will not benefit the public at large. Such work by its nature usually will not reach a general audience, but, by enlightening interested scholars, it often is of great benefit to the public at large. To suggest otherwise is to ignore the important role of academe in our democracy. The relevant inquiry, as we see it, is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.

From the information he submitted to the DOJ, we are satisfied that Carney will disseminate the disclosed

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[4] The legislative history concerning the present fee waiver provision indicates that there was some dispute as to whether the requester must disseminate the information obtained through FOIA requests in order to qualify for the public interest fee waiver. Senator Leahy believed that a waiver might be appropriate if the requested record enhanced the understanding of only a single person, *see* 132 Cong. Rec. S14, 298 (daily ed. Sept. 30, 1986), while Senator Hatch thought the term "public" should be "applied so as to require a breadth of benefit beyond any particularly narrow interests that might be presented." 132 Cong. Rec. S16, 505 (daily ed. Oct. 15, 1986). Our holding here is consistent with Senator Hatch's view in that we conclude that Carney has shown that disclosure to him will have a sufficient "breadth of benefit" beyond his own interests.

records to a sufficiently broad audience of students and academics interested in his work. There is evidence in the administrative record that very little has been written regarding the role of the DOJ in the selection process, and the DOJ does not dispute this. Moreover, Carney submitted evidence that he is a serious scholar, qualified to perform research on this subject. Thus, we are satisfied that Carney's work is likely to be considered by other scholars. While it is true that Carney's book is only tentative, the fact that he is working on a related dissertation is sufficient evidence, for purposes of the public interest fee waiver, to conclude that his book will be completed. Thus, we reject the DOJ's contention that Carney was required to prove that his articles and book would be published.

As alternative reasons for denying Carney's requests for fee waivers, the DOJ asserts that most of the records Carney requested were exempt from mandatory disclosure and that the non-exempt records either already were in the public domain or were not of interest to the public. We consider these assertions in turn. First, under the circumstances of this case, we do not believe that it was proper to deny the fee waivers simply because records may have been exempt from disclosure. A fee waiver request should be evaluated based on the face of the request and the reasons given by the requester in support of the waiver. *Cf. Project on Military Procurement v. Department of the Navy*, 710 F. Supp. 362, 367 (D.D.C. 1989)(rejecting argument that fee waiver should be denied because documents may be exempt). Thus, it would be proper to deny a fee waiver on this basis only if the request was for patently exempt documents. If the rule were otherwise, requesters might be deterred from testing the bounds of the FOIA exemptions. An agency could require a requester who is otherwise entitled to a fee waiver to make payment even before the agency's claimed exemption has been tested in court. Moreover, if the request is for records that should be disclosed in the public interest, the agency should not be allowed to charge for searching the records,

because the requester is acting in the public interest by attempting to obtain the records.

The DOJ's assertion that disclosure to Carney would not significantly contribute to the public's understanding because much of the information disclosed to Carney already was in the public domain also is questionable as applied in this case. *See* 28 C.F.R. § 16.10(d)(2)(ii) (information already public unlikely to benefit public). We agree that, in some instances, it may be appropriate to deny a fee waiver because the requested records are available from public sources. If, for example, at the time of the request the requested records are readily available from other sources, then it is logical to conclude that further disclosure by the agency will not significantly contribute to the public's understanding. However, the mere fact that particular records have been released to other requesters does not mean that the information contained in the records is readily available to the public. *Cf. Fitzgibbon v. Agency for Int'l Dev.*, 724 F. Supp. 1048, 1051 (D.D.C. 1989) (records were not in public domain merely because they were available in agency's public reading room). In this case, the OLC and OIP merely stated that the records Carney requested had been released to other requesters without explaining how these records were readily available to the public. Accordingly, Carney's requests for fee waivers should not have been rejected for this reason.

Finally, the DOJ asserts that many of the records released to Carney were not of interest to the public. Indeed, several of Carney's requests apparently did not relate to his academic research. For instance, Carney requested a large number of records relating the DOJ's processing of his own FOIA requests; and he did not indicate how disclosure of this information to him would be in the public interest. We suspect that Carney requested these records in preparation for litigation with the DOJ over his FOIA requests, in which case a fee waiver is inappropriate. *See McClellan v. Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1287 (9th

Cir. 1987). Accordingly, we find that Carney properly was required to pay for the costs associated with these requests. On remand, the district court should consider the extent to which Carney's requests relate to his actual research and reduce the fees assessed to Carney proportionately.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court to the extent it dismissed Carney's claims relating to fee waivers and remand the case for consideration by the district court in a manner consistent with the foregoing. We affirm the judgment of the district court in all other respects.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID CARNEY,

Plaintiff,

v.

92-CV-6204

DECISION

and

ORDER

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

INTRODUCTION

Plaintiff David Carney ("Carney") brings this action pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552. His complaint states five claims: that the defendant Department of Justice (the "DOJ"), through three of its components—the Office of Legal Counsel (the "OLC"), the Office of Information and Privacy (the "OIP"), and the Civil Rights Division ("Civil Rights")—improperly withheld agency records from plaintiff notwithstanding his proper requests under FOIA (Count I); that the DOJ improperly denied plaintiff's request to be furnished documents without fee, or at a reduced fee, pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii)[1] (Count II); that because plaintiff is entitled to

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[1] Section 552(a)(4)(A)(iii) provides that "Documents shall be furnished without any charge or at a charge reduced below the fees established under [§552(a)(4)(A)(ii)] if disclosure of the information is in the public in-

(Footnote continued on next page)

the benefit of § 552 (a)(4)(A)(iii), the DOJ erred when it collected $250.00 from him to cover partially the costs of providing documents pursuant to certain of his FOIA requests (Count III); that plaintiff is entitled to a declaration from this Court that a question exists as to whether the DOJ acted arbitrarily/capriciously in responding to his FOIA requests, presumably in order to trigger § 552(a)(4)(F), which provides that such a declaration, when coupled with an order to the agency to produce documents which have been withheld in violation of FOIA, will result in a special proceeding to determine whether "disciplinary action is warranted. . . ." (Count IV); and a claim for costs and attorney fees (Count V).

Presently before the Court are several motions: defendant's motions for summary judgment; plaintiff's motion for summary judgment on Counts II and III; plaintiff's motion to strike certain affidavits submitted in support of defendant's summary judgment motion; and plaintiff's motion for discovery pursuant to Fed. R. Civ. P. 56(f).[2] For the reasons stated below, plaintiff's motions are denied, defendant's motions for summary judgment are granted, and the case is dismissed.

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terest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor."

[2] Rule 56(f) provides: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

FACTS

Plaintiff's Background

The plaintiff is a graduate student in the Department of Political Science at the University of Rochester and has been working on obtaining a doctorate since 1988. He is also a lawyer, having graduated from Southern Methodist University Law School in 1981, and a member of the Alaska Bar Association since that time. He is presently writing a doctoral dissertation on the federal jurisdictional appointment process, with an apparent emphasis on the senatorial confirmation aspect of that process. An area of particular concern to the plaintiff has been the input of DOJ personnel to this process, and the political significance of such input. He has been researching the judicial appointment process since 1990, and this research has been his "only significant project [since the summer of 1991.]"

As a part of his research, Carney has conducted almost one hundred interviews with various government officials, journalists, and interested private citizens. He has undertaken extensive correspondence with respect to this project and has made a number of trips to Washington, D.C., where he has attended confirmation hearings and performed additional research. He has also filed with the DOJ numerous related requests for disclosure of information pursuant to FOIA, which requests form the basis of this action.

Plaintiff's FOIA Requests

Carney submitted four FOIA requests to the OLC, one to the OIP, and three to Civil Rights. A review of those requests indicates that they would necessarily require extensive research on the part of the responding agency. In his first FOIA request to the OLC, dated October 9, 1991, Carney demanded "any records" of directory information concerning OLC employees, from 1986-1990; background information on specific OLC employees (The record indicates that when he had had correspondence or other contact with

certain OLC employees, he would then request similar information on those individuals); "any" background information gathered by the OLC with respect to Clarence Thomas, David Souter, and Robert Bork, as well as "any communications" between the OLC and the Office of the President of the United States with respect to the nomination/confirmation of Clarence Thomas, David Souter, and Robert Bork. He also asked for a list of all other FOIA requests received by the OLC from 1985-present "which pertain to any/all federal judicial nominations or confirmations [,]" as well as "any" OLC policy statements pertaining to the selection and nomination of judicial candidates.

In one request dated December 4, 1991, Carney asked for "any" records concerning the nomination and/or confirmation hearings of Warren Burger, Abe Fortas, Clement Haynesworth, Harold Carswell, Harry Blackmun, and Lewis Powell. He also asked specifically for certain related records generated by William H. Rehnquist, Chief Justice of the Supreme Court, during the time he was employed by the OLC.

Apparently not happy with the OLC's lack of substantive response to his FOIA requests, Carney issued another FOIA request to the OLC, dated December 4, 1991, seeking information on the DOJ processing of FOIA requests, as well as information concerning certain OLC employees and Anita Hill.

Carney's FOIA request to the OIP dated April 30, 1992 asked for information concerning the processing of his own previous FOIA requests, as well as directory information on OIP employees.

Carney's first FOIA request to Civil Rights, dated October 9, 1991, demanded directory information for its employees, background information on certain named Civil Rights employees, policy statements of Civil Rights with respect to the judicial nomination/confirmation process, background records with respect to certain Supreme Court nomi-

nees, and information on the manner in which Civil Rights processes FOIA requests. Similar to his later requests to the OLC, Carney's subsequent FOIA requests to Civil Rights, dated April 30, 1992, focus almost exclusively on the processing of FOIA requests, and specifically the processing of his own requests.

The DOJ's Responses to Carney's FOIA Requests

I find no purpose to be served in painstakingly reciting the entire processes undertaken by OLC, OIP, and Civil Rights in replying to Carney's FOIA requests. It is sufficient to say that, having reviewed the affidavits of the DOJ employees submitted in support of defendant's motions for summary judgment, and the parties' correspondence annexed to such affidavits, I find that the various components of the DOJ to whom Mr. Carney directed his FOIA requests fulfilled their duties under the FOIA to comply with those requests. The DOJ, through its various components, answered the requests after extensive searches, stated exemptions which either precluded disclosure or required redaction as to certain documents, or offered to refer Carney's requests to the appropriate agency/component thereof, an offer which Carney failed to accept. Admittedly, those responses were not forthcoming within the statutory time frame, but those delays are excusable in light of the scope and difficulty of the requests made. There is absolutely no indication that the responses to Carney's requests were statutorily deficient or made in bad faith.

Plaintiff's Requests for Fee Waivers

In a letter to Richard Huff of the OIP, dated October 9, 1991, Carney requested, *inter alia*, that he be furnished documents pursuant to his FOIA requests at no charge, or at a reduced charge. In support of this request, Carney cited 5 U.S.C. § 522(a)(4)(A)(iii), which provides:

> Documents shall be furnished without any charge or at a charge reduced below the fees

> established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Carney informed Huff that he was a graduate student involved in writing both a doctoral dissertation and a book on the judicial appointment process and that, while he had written a couple of pieces for the Rochester, New York daily paper, he was "not a journalist."

In a letter dated January 29, 1992, Douglas Cox of the OLC responded to Carney's October 9th letter, and, while the letter does not flat out deny Carney's request for a fee waiver, it states that "[W]e so not believe that we will be able to grant your request for a fee waiver." The DOJ's position was, and has been consistently throughout this litigation, that Carney has failed to present facts from which to conclude that the finished products of his research—a dissertation and proposed scholarly articles and a book for which he tendered neither notes nor any evidence of a publishing contract—would reach the general public, let alone contribute to its understanding of the way its government works. Notwithstanding Carney's October 9th statement that he is "not a journalist," in subsequent protestations of the DOJ's refusal to waive fees on his FOIA requests he stated that he is "'a representative of the news media' within the meaning of [FOIA]" and accordingly entitled to a waiver of search fees under § 522(a)(4)(A)(ii)(II).

DISCUSSION

Initially, I note that this case is before the Court without benefit of a record fully developed at the administrative level. Although both the complaint and answer state that Carney has exhausted available administrative remedies, that

exhaustion reflects only that defendant failed to process plaintiff's FOIA appeals timely, pursuant to 5 U.S.C. § 522(a)(6)(A)(ii), which provides that an agency must make a determination with respect to an appeal within 20 days of receiving it. It also appears from the record that plaintiff failed to appeal properly the denial of his fee exemption. Nevertheless, neither party asks this Court to determine whether plaintiff has properly exhausted administrative remedies, *cf. Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (vacating order of dismissal of FOIA complaint where district court had failed to address government's argument that requester had not exhausted administrative remedies), and, mindful of the timely manner in which Congress intended FOIA matters to be resolved, 5 U.S.C. § 522(a)(4)(D), I proceed to the merits of this action.

Carney does not dispute that the DOJ has provided him access to thousands of pages of documents in response to his FOIA requests. He insists, however, (i) that he should not have to pay for such disclosure.

The Document Disclosure

The Freedom of Information Act "is a broadly conceived statute whose overriding aim is disclosure." *F.L.R.A. v. U.S. Dept. Veterans Affairs*, 958 F.2d 503, 505 (2d Cir. 1992). FOIA requires federal agencies to disclose records within their possession which are not subject to any of the statute's nine specific categories of exemption from disclosure. 5 U.S.C. § 522(b); *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 104 S.Ct.. 1488, 1489-90, 79 L.Ed.2d 814 (1984). In this case, while the various components of the defendant agency from whom Carney sought disclosure have provided him access to extensive documentation, they have also with-

held extensive materials, claiming exemption under § 522(b)(5)[3] ("Exemption 5") and (6)[4] ("Exemption 6").

Exemption 5

Exemption 5 "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *FTC v. Grolier, Inc.*, 462 U.S. 19, 103 S.Ct. 2209, 2214, 76 L.Ed.2d 387 (1983). While "the public is entitled to all such memoranda and letters that a private party could discover in litigation with the agency[,]" *EPA. v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), "the [Supreme C]ourt has consistently rejected a construction of FOIA which would render it **an adjunct** to civil discovery." *Weber*, 104 S.Ct. at 1494; *see* cases cited thereat. Exemption 5 covers the executive privilege, attorney-client privilege, and attorney work product privilege. *See Weber*, 104 S.Ct. at 1494. It also covers documents which have come to an agency from another agency **solely** on the understanding that they would be held confidential, when such "confidentiality is necessary to ensure frank and open governmental operations." *Id.*, citations omitted. Thus, Exemption 5 covers the grounds upon which the defendant withheld/excised extensive documentation requested by plaintiff concerning the deliberative processes which precede the confirmation of judicial candidates.

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3 Section 522(b)(5) provides an exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]"

4 Section 522(b)(6) provides an exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

Exemption 6

Exemption 6 is the general privacy exemption under FOIA. Its applicability to an agency document "turns on whether an invasion of privacy is 'warranted.'" *Hopkins v. U.S. Dept. Housing & Urban Dev.*, 929 F.2d 81, 86 (2d Cir. 1991).

> This language requires an analysis unusual under FOIA, involving a balancing of the harm to the individual whose privacy would be breached against the public interest that would be served by disclosure. *Id.*

Defendant has invoked Exemption 6 to withhold from plaintiff extensive directory information for its employees, and to excise other documents. The interest of individual employees in avoiding disclosure of their names and addresses is well established. *Id.* at 87. Disclosure of such information affecting individuals' privacy interests "is permissible only if the information reveals something directly about the character of a government agency or official." *Id.* at 88.

Plaintiff Does Not Directly Challenge These Exemptions

Although Carney's complaint alleges that none of the withheld documents are subject to privilege or other exemption, the thrust of his opposition to defendant's motion for summary judgment has not been to challenge the exemptions upon which defendant has based its withholding of documents, nor has it been to request this Court to review the documents so withheld in order to determine whether they are subject to exemption under FOIA. Rather, he repeatedly asserts that defendant has failed to disclose the existence of many documents which are (i) within its possession, (ii) not subject to any privilege, and (iii) responsive to his FOIA requests. Carney bases this assertion on his prior research, including extensive interviews with individuals within and outside of government. He states that he is unable to support his argument with admissible proof, such as affidavits and

corroborating letters, because his sources spoke to him confidentially.

The nature of plaintiff's argument requires me to address now the merits of two of his motions, the motion to strike certain affidavits filed by the defendant in support of its motion for summary judgment, and the motion pursuant to Fed.R.Civ.P. 56(f) to permit discovery of the defendant in order to answer its affidavits.

Plaintiff's Motion to Strike Affidavits

Plaintiff seeks to strike the affidavits of Paul Colburn, Miriam Nisbet, and Nelson Hermilla, which were submitted by defendant to demonstrate how the OLC, OIP, and Civil Rights had processed plaintiff's FOIA requests. Plaintiff argues that the affidavits are not based on personal knowledge, because the affiants rely on information provided to them by other employees of their respective agency components. Courts have recognized that the

> peculiarities inherent in the FOIA litigation, with the respondent agencies often in sole possession of requested records and with information searches conducted only by agency personnel, have led federal courts to rely on government affidavits to determine whether the statutory obligations of the FOIA have been met.

Perry v. Black, 684 F.2d 121, 126 (D.C.Cir. 1982). There is "no need for [such] affidavits to set forth with meticulous documentation the details of an epic search for the requested records." *Id.* at 127. When a requester has failed either to submit "countervailing evidence" or to establish "inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Id.*

There is no basis in either the statute or the relevant case law to require that an agency effectively establish by a series of sworn affidavits a "chain of custody" over its search process. The format of the proof submitted by defendant—declarations of supervisory employees, signed under penalty of perjury—is sufficient for purposes of both the statute and Fed. R. .Civ. P. 56. *See* 28 U.S.C. 1746; *see also Goldman, Antonetti, Ferraiouli, Axtmayer & Hertell v. Medfit International, Inc.*, 982 F.2d 686 (1st Cir. 1993) (discussing and collecting cases concerning the propriety of submitting unsworn statements signed under penalty of perjury in connection with a summary judgment motion). Thus plaintiff has stated no basis for striking them from the record.

Plaintiff's Motion Pursuant to Fed. R. Civ. P. 56(f)

Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing summary judgment that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 56(f) requires an opponent to a summary judgment motion to state by affidavit the nature of the uncompleted discovery, how the factual material sought is reasonably expected to create a genuine issue of material fact, the efforts the opponent to the summary judgment motion has already made to obtain the material, and why those efforts were unsuccessful. *Burlington Coat Factory Corp. v. Esprit de Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). The gist of plaintiff's affidavit in support of his 56(f) motion is an expansion on his complaint, the underlying FOIA requests, and his correspondence with defendant. He is convinced that defendant

is withholding documents responsive to his request and his conviction is based on "information and belief, . . . confidential interviews with current and former DOJ attorneys, Senate Judiciary staff, interest group representatives, members of the Washington press corps, White House staff, judges and others, [as well as plaintiff's] observations at and around confirmation hearings, and [his] reading of scholarly publications, books, and journalistic reports." (Affidavit of David W. Carney, sworn to February 5, 1993, ¶ 5.) He repeats that he is unable to support his application with the statements of other individuals with actual knowledge of the existence of such documents because his sources of that information are confidential.

I realize that Mr. Carney, in his search for information to assist him in writing a dissertation and, possibly, a book, faces an uphill battle. He seeks information from a massive bureaucratic organization which, historically, may not have shared such information willingly or easily. Such reluctance to open the workings of government to appropriate scrutiny was obviously an important concern to Congress when it crafted the FOIA. But upon careful review of his applications, and a searching review of both the declarations submitted by defendant and the parties' correspondence, I can find absolutely no basis for determining that Mr. Carney's 56(f) motion—indeed, his complaint—is grounded on anything other than speculation. I find that such speculation, absent any evidence to contradict defendant's proof, or to establish defendant's bad faith, *see Washington Post Co. v. U.S. Dept. of State*, 840 F.2d 26, 43-44 (D.C. Cir. 1988) (Bork, J., dissenting), *vacated*, 898 F.2d 793 (D.C. Cir. 1990), is insufficient to sustain plaintiff's request pursuant to Rule 56(f). *See Contemp. Mission Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981).

Having denied plaintiff's motions to strike and for discovery, I consider solely on the record before me whether defendant's responses to his FOIA requests comply with the

agency's obligations under the statute, and I find that they do. *See Perry v. Black*, 684 F.2d 121, 126-27 (D.C. Cir. 1982).

Plaintiff's Fee Exemption Requests

As stated earlier, plaintiff asked defendant to exempt him from all payment for his FOIA searches because disclosure of the requested documents to plaintiff would be in the public interest "because it is likely to contribute significantly to public understanding of the operations of the government. . .", 5 U.S.C. § 522(a)(4)(A)(iii). Plaintiff bases his request on his intention to use the information received in response to his FOIA requests to publish a doctoral dissertation, other scholarly works, and a book for the popular audience on the same topic, as well as on his intention to continue to teach and research related topics for many years to come. On this basis, plaintiff moved for summary judgment seeking both a declaration that he is exempt from fees and a return of the fees he has already paid.

Alternatively, and notwithstanding his statement to a defendant employee that he is "not a journalist", plaintiff seeks a limitation on his fees under § 522(a)(4)(A)(ii)(II), which limitation is extended, *inter alia*, to "representatives of the news media".

In opposing plaintiff's motion and cross-moving against it, defendant stated that not only had plaintiff failed to submit either further evidence of his eligibility for a fee waiver under § 522(a)(4)(A)(iii), (as defendant invited him to do), or a proper administrative appeal from those denials, but also that, on the record before the agency at the time it denied his requests, denial was appropriate. In response, plaintiff challenges, without any citation or support, the constitutionality of § 522(a)(4)(A)(vii), which provides: "In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: **Provided**, that the court's review of the matter shall be limited to the record before the agency."

I decline to consider plaintiff's constitutional challenge. My consideration of defendant's denials of his fee waiver/limitation requests is limited to the record before the agency. Moreover, even were I to consider the further submissions of plaintiff in support of his challenge to the denial of such a waiver, I would find that he is not eligible for a waiver of fees under either basis. The projects which plaintiff contemplates undertaking in connection with his FOIA requests—a dissertation, future teaching and scholarly publishing, and a very tentative book—are simply insufficient to establish that release of information to him under FOIA would "contribute significantly to public understanding . . . of the government[,]" and thus form no basis for an exemption under § 522(a)(4)(A)(iii). Nor do his journalistic activities—a very occasional piece for the hometown papers—merit status as a "representative of the news media". Notwithstanding plaintiff's cogent arguments to the contrary, and recognizing that Congress intended the phrase "representative of the news media" to be construed broadly, *see Nat'l Sec. Archive v. U.S. Dept. of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), *cert. denied, U.S. Dept. of Defense v. Nat'l Sec. Archive*, 494 U.S. 1029 (1990), I find no basis for determining that plaintiff is a person "[who] regularly publishes or disseminates information to the public" so as to qualify for a waiver/limitation of FOIA fees under § 522(a)(4)(A)(ii)(II). *Id.*

WHEREFORE, plaintiff's motions for partial summary judgment, to strike affidavits, and for discovery pursuant to Fed.R.Civ.P. 56(f) are denied; defendant's motions

for summary judgment are granted, and this case is dismissed.

ALL OF THE ABOVE IS SO ORDERED.

/s/
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
April 26, 1993

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID CARNEY

JUDGMENT IN A CIVIL CASE

v.

UNITED STATES DEPARTMENT
OF JUSTICE

CASE NO. 92-CV-6204T

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed.

April 27, 1993
Date

Rodney C. Early
Clerk

Janet E. Mulley
(By) Deputy Clerk

No. 93-2041

Supreme Court, U.S.
FILED
AUG 25 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

DAVID CARNEY, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
ROBERT S. WHITMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in this action by petitioner under the Freedom of Information Act, 5 U.S.C. 552, the district court abused its discretion by denying petitioner's motion to conduct discovery under Fed. R. Civ. P. 56(f) before ruling on the government's motion for summary judgment on its exemption claims.

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UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 19 F.3d 807. The opinion of the district court (Pet. App. 17a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. The petition for a writ of certiorari was filed on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner requested documents from several components of the Department of Justice under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Depart-

ment withheld certain documents responsive to petitioner's requests on the ground that they fell within two FOIA exemptions. In this action by petitioner to compel disclosure of the withheld documents, the district court granted summary judgment for the Department after denying petitioner's motion to conduct discovery under Fed. R. Civ. P. 56(f). Pet. App. 17a-31a. The court of appeals affirmed. *Id.* at 1a-16a.

1. In October 1991, petitioner, who is a lawyer and graduate student in political science, submitted numerous, extensive FOIA requests to several components of the Department of Justice. The requests sought documents relating to Supreme Court appointments, lower federal court appointments, and Department personnel. Petitioner later submitted follow-up requests seeking documents relating to additional Department personnel, the Department's FOIA processing procedures, and the processing of his own requests. Three Department components—the Office of Legal Counsel (OLC), the Office of Information and Privacy (OIP), and the Civil Rights Division (Civil Rights)—were responsible for processing petitioner's requests. Pet. App. 2a-3a, 19a; see C.A. App. 19.

2. In May 1992, petitioner filed this action against the Department of Justice in the United States District Court for the Western District of New York, seeking to compel disclosure of the requested documents. The district court stayed the proceedings until December 15, 1992, to allow OLC, OIP, and Civil Rights to complete the processing of petitioner's requests. Each component later made a large quantity of responsive material available to petitioner by furnishing him with copies of many documents and permitting him to examine and copy other documents at the Department's offices. The components also withheld certain responsive documents

in whole or in part, however, under Exemption 5[1] and Exemption 6[2] of the FOIA. Pet. App. 5a-6a, 23a-24a.

The Department moved for summary judgment on its exemption claims. In support of the motion, the Department submitted three lengthy declarations from the officials in OLC, OIP, and Civil Rights who had supervised the processing of petitioner's requests. C.A. App. 17-38, 61-82, 162-169 (reproducing declarations). Each declaration described how the component had searched for responsive documents, what documents had been withheld, and why the withheld documents were exempt from disclosure under the FOIA.

Instead of opposing the government's summary judgment motion on the merits, petitioner filed procedural motions seeking to conduct discovery under Fed. R. Civ. P. 56(f), to compel responses to discovery requests that he had submitted with his complaint, and to strike the three declarations. In support of those motions, petitioner alleged in an affidavit that he believed that the Department had not identified or accurately described all responsive documents. Petitioner claimed that his belief was based on numerous confidential interviews and his own research. He did not, however, identify any of those interviewees or the research on which he relied. C.A. App. 197-212.

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[1] FOIA Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).

[2] FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

The district court denied petitioner's procedural motions.[3] Pet. App. 17a-31a. In particular, the court found "absolutely no basis for determining that [petitioner's] [Rule] 56(f) motion * * * is grounded on anything other than speculation." *Id.* at 28a. The court held that such speculation, "absent any evidence to contradict [the Department's] proof, or to establish [the Department's] bad faith, is insufficient to sustain [petitioner's] request pursuant to Rule 56(f)." *Ibid.* (citation omitted) The court further held that the withheld documents fell within the claimed exemptions, and it accordingly granted summary judgment for the Department. *Id.* at 24a-26a.[4]

3. In the court of appeals, as in the district court, petitioner did not challenge the government's exemption claims on the merits. Instead, as relevant here, he challenged only the district court's decision to rule on the government's motion for summary judgment without ordering discovery under Rule 56(f). The court of appeals affirmed. Pet. App. 1a-16a. It observed that petitioner had alleged "that the [Department] has concealed the existence of records and mischaracterized other

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[3] Petitioner based his motion to compel responses to his initial discovery requests on the same grounds that he asserted in support of his motion for discovery under Rule 56(f). Accordingly, neither the district court nor the court of appeals analyzed those two motions separately. See Pet. App. 8a-10a, 27a-29a. Both courts below denied petitioner's motion to strike the agency declarations. *Id.* at 10a-11a, 26a-27a. Of petitioner's three procedural motions, only his motion under Rule 56(f) is at issue in this Court. See Pet. 7.

[4] The district court also held that petitioner was not entitled to a waiver of FOIA search fees. Pet. App. 29a-30a. The court of appeals reversed that holding in part, *id.* at 11a-16a, and it is no longer at issue.

records in order to avoid disclosing them to him." *Id.* at 9a-10a. It found itself, however, "faced with a complete lack of tangible proof of [that] allegation[]." *Ibid.* The court explained that "[petitioner] does not identify, by name, title or otherwise, any of the individuals he interviewed, nor does he point to any of the published sources on which he supposedly relies." *Ibid.* The court "sympathized" with petitioner's asserted wish not to reveal confidential sources, but it determined that "something more than [petitioner's] bare allegations [was] needed." *Ibid.* The court concluded that "[w]ithout factual support, [petitioner's] allegations are grounded in mere speculation, and the district court therefore did not abuse its discretion in denying him discovery." *Ibid.*

ARGUMENT

The court of appeals correctly applied well-settled legal principles, equally applicable to FOIA and other civil litigation, in upholding the denial of petitioner's Rule 56(f) motion and the award of summary judgment for the government. As petitioner concedes (Pet. 9), the court of appeals' decision does not conflict with any decision of this Court or that of any other court of appeals. Further review therefore is not warranted.

1. The court of appeals correctly stated the standards governing the government's motion for summary judgment. The court stated that "[i]n order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption of the FOIA." Pet. App. 8a (citing 5 U.S.C. 552(a)(4)(B) and *EPA* v. *Mink*, 410 U.S. 73, 79 (1973)). The court further stated that the agency may meet that burden by submitting affidavits or declarations "indicating that [it] has conducted a

thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption." Pet. App. 8a. Because the agency's affidavits "are 'accorded a presumption of good faith,'" the court said, discovery regarding the agency's search and the claimed exemptions "generally is unnecessary if the agency's submissions are adequate on their face." *Ibid.* (quoting *Safecard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). The court noted, however, that the plaintiff may rebut that presumption by making "a showing of bad faith on the part of the agency sufficient to impugn" the integrity of the agency's submissions, or by providing "some tangible evidence that an exemption claimed by the agency should not apply or [that] summary judgment is otherwise inappropriate." Pet. App. 8a-9a.

Petitioner does not and cannot challenge the court of appeals' statement of the governing principles. Instead, he argues (Pet. 10-11) that, in applying those principles to the facts of this case, the court of appeals in effect adopted a "rule" of deference to agency affidavits that is "questionable" in light of FOIA's objectives of openness in government and the "imbalance" of information in FOIA cases. Petitioner mischaracterizes the court of appeals' decision.

The court of appeals did not adopt a "rule" barring discovery in FOIA cases. Rather, it articulated a standard—that discovery "*generally*" is unnecessary in FOIA cases "*if*" the agency's declarations are adequate on their face, Pet. App. 8a (emphasis added)—that calls for case-by-case examination of the agency's submission. The court then correctly determined that the declarations submitted by the Department in this case were adequate on their face, because they were "reasonably detailed," they "reveal[ed] that each of the [Department] subdivisions undertook a diligent search

for documents responsive to [petitioner's] requests," and they "describe[d] the documents or classes of documents withheld and explain[ed] why they fall within an applicable exemption." *Id.* at 9a. In light of that determination, the court of appeals properly held that the Department had adequately supported its motion for summary judgment.

The court of appeals did not hold that, in order to avoid summary judgment, a FOIA plaintiff must provide "'tangible proof' of governmental misconduct," as petitioner asserts (Pet. 13). Instead, the court said that, "once the agency has satisfied its burden" on a summary judgment motion, the party opposing the motion must "provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate." Pet. App. 8a-9a. Thus, the court of appeals did not purport to limit the means by which a FOIA plaintiff can avoid summary judgment. It simply held that, in order to defeat a properly supported motion for summary judgment, a FOIA plaintiff must make the same showing as any other non-moving party. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 884-885 (1990); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986).

Petitioner suggests that a FOIA plaintiff should not have to make the same showing that other civil litigants must make to avoid summary judgment, because of the "imbalance" of information in FOIA cases. Pet. 11. Any such "imbalance," however, is addressed by the FOIA itself, which puts the burden on the agency to justify its withholding of responsive documents. 5 U.S.C. 552(a)(4)(B); *EPA* v. *Mink*, 410 U.S. at 79. The court of appeals was cognizant of that burden and correctly held that the government had met it. See Pet. App. 8a.

2. Petitioner challenges the denial of his Rule 56(f) motion on essentially the same ground that he challenges the award of summary judgment for the Department. He contends that the court of appeals "improperly truncate[d]" the application of Rule 56(f) by holding that "an FOIA plaintiff cannot rely on Rule 56(f) in the absence of 'tangible proof' of governmental misconduct." Pet. 8, 13. Petitioner again mischaracterizes the court's holding.

The court of appeals emphasized that, in order to prevail on a Rule 56(f) motion, a FOIA plaintiff need not present evidence that would be admissible at trial. Pet. App. 10a. The court correctly recognized, however, that a Rule 56(f) motion must be supported by "something more than * * * bare allegations." Pet. App. 10a. That is the same standard that courts apply outside of the FOIA context. See, *e.g.*, *Contemporary Mission, Inc.* v. *United States Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981); *Cramer* v. *Devon Group, Inc.*, 774 F. Supp. 176, 180 (S.D.N.Y. 1991); see also *Applegate* v. *Top Assocs., Inc.*, 425 F.2d 92, 96 (2d Cir. 1970). Indeed, it is the same standard that petitioner endorses. Pet. 15 ("The normal Rule 56(f) test * * * mak[es] clear that 'vague assertions' regarding facts to be discovered are insufficient, alone, to warrant discovery.").

Thus, the court of appeals did not hold that a FOIA plaintiff is required in every case to support a Rule 56(f) motion by presenting evidence of governmental wrongdoing. The court cited the lack of such evidence here only because petitioner based his Rule 56(f) motion on his "conten[tion] that the DOJ ha[d] concealed the existence of records and mischaracterized other records in order to avoid disclosing them." Pet. App. 9a-10a. Thus, it was petitioner who raised the issue of agency misconduct as a basis for discovery under Rule 56(f).

The court of appeals correctly determined that there was a "complete lack of tangible proof" of such misconduct, and that petitioner's "bare allegations" were inadequate. Pet. App. 10a.[5]

Nor are the courts of appeals "befuddled" by the role of Rule 56(f) in FOIA litigation, as petitioner asserts (Pet. 13). The single decision that petitioner cites in support of that assertion, *Church of Scientology* v. *IRS*, 991 F.2d 560 (9th Cir. 1993), manifests no division or confusion among the courts of appeals on that score. Instead, the court in *Church of Scientology* simply declined to make a "broad statement" about "the general discretion of a district court to grant or deny a Rule 56(f) motion," opting instead for a careful and fact-specific resolution. *Id.* at 563. Moreover, because the court of appeals in that case held that the FOIA plaintiff before it was entitled to conduct discovery, the decision shows that courts permit discovery in FOIA cases if the plaintiff makes a sufficient factual showing to justify it.

3. Finally, petitioner argues (Pet. 16-20) that the courts below erred in holding that he failed to satisfy the standard for conducting discovery under Rule 56(f). Petitioner concedes (Pet. 19), however, that the district court's ruling on that issue was subject to review only

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[5] The Seventh Circuit, sitting *en banc*, held in a similar context that a district court did not abuse its discretion by refusing to conduct an *in camera* review of requested documents based solely on an assertion of government bad faith. If district courts were required to conduct *in camera* review based solely on such an assertion, the court reasoned, they "would feel obligated" to do so "in nearly every FOIA case, because nearly every FOIA request would be accompanied by the talismanic buzz words 'Government wrongdoing.'" *Silets* v. *Department of Justice*, 945 F.2d 227, 231-232 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 2991 (1992).

for an abuse of discretion.[6] The court of appeals properly held that, under the circumstances of this case, the district court acted within its discretion in denying petitioner's Rule 56(f) motion. Pet. App. 10a. That factbound holding does not merit further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

As both lower courts found, petitioner relied on "mere speculation" in seeking discovery under Rule 56(f). Pet. App. 10a; see *id.* at 28a. For example, he asserted in the affidavit supporting his Rule 56(f) motion that the Department had withheld certain categories of responsive documents. C.A. App. 200-202. However, many documents in those categories were in fact disclosed to him, as the Department's declarations made clear. Compare, *e.g.*, *id.* at 201 (assertion in petitioner's affidavit that Department had withheld material supplied to Senate Judiciary Committee) with *id.* at 31 (declaration describing such material). Although petitioner also purportedly described specific documents that he believed had been withheld, see *id.* at 203-205, he did not show that the Department was in possession of those

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[6] District courts are accorded discretion by the plain terms of Fed. R. Civ. P. 56(f), which provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

documents but failed either to make them available to him or to explain why they had not been made available.[7]

Moreover, even if petitioner had shown that there were certain responsive documents in the Department's files that had not been made available to him or described in the agency's declarations, that showing would not have precluded summary judgment. In reviewing an agency's declaration in support of summary judgment, the relevant question "is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *Safecard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); accord, *e.g.*, *In re Wade*, 969 F.2d 241, 249 n.11 (7th Cir. 1992) ("The issue is *not* whether other documents may exist, but rather whether the search for undisclosed documents was adequate."); see also *Oglesby* v. *Department of the Army*, 920 F.2d 57, 67 n.13 (D.C. Cir. 1990) (claim that other responsive documents "*must* exist" is "insufficient to raise a material question of fact with respect to the adequacy of the agency's search"); *Miller* v. *Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) ("the search need only be reasonable; it does not have to be exhaustive").

Petitioner asserts that it was a "gross miscarriage of justice" for the courts below to deny him discovery because "the sources of his information [were] * * * unwilling to provide on-the-record confirmation" of the allegations in his Rule 56(f) affidavit. Pet. 17. The

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[7] In this Court, petitioner asserts (Pet. 4 n.3, 17 n.15, 18 n.18) that he supplied evidence of improperly withheld documents by "cit[ing]" several books relating to the Department's role in the process of nomination and confirmation of Supreme Court Justices. None of those books, however, was cited in his Rule 56(f) affidavit or in any other documents in the record before the lower courts.

premise of that assertion is incorrect. The courts below did not require petitioner to disclose the identity of any confidential sources. Indeed, the court of appeals expressed sensitivity to petitioner's wish to honor any assurances of confidentiality he had made. Pet. App. 10a. The court simply required "something more than his bare allegations." *Ibid.*

Petitioner could have supplied more than bare allegations without compromising any confidential sources. For example, he could have asked the district court for leave to submit affidavits from his interviewees under seal or pursuant to a protective order; he could have requested *in camera* review to test the validity of the declarants' statements; he could have sought appointment of a "special master" or a sampling of responsive documents; or he could have submitted FOIA requests, in the first instance, that identified with particularity the documents he allegedly knew to exist. Petitioner did none of those things. He cannot now complain that the district court did not "explore less severe alternatives to a summary judgment dismissal" (Pet. 20) that he (an attorney himself) never suggested.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
ROBERT S. WHITMAN
Attorneys

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